IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 494 of 1981

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PARESH & COMPANY - Appellant(s)

Versus

SARABHAI LTD & 1 - Defendant(s)

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Appearance :

MR SK JHAVERI for Appellant(s) : 1,
NANAVATI ASSOCIATES for Defendant(s) : 1,
NOTICE SERVED for Defendant(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 15/12/2005

ORAL JUDGMENT

This First Appeal arises out of the judgment and decree passed by the learned Presiding Judge, Court No.17 of the City Civil Court, Ahmedabad on September 13, 1980 in Civil Suit No.1921 of 1975. For the sake of convenience the appellant is addressed to as the

defendant No.1, respondent No.1 as the plaintiff and respondent No.2 as defendant No.2 in this judgment. The suit was filed by respondent No.1 against the appellant and defendant No.2. The suit was filed by the plaintiff for declaration to the effect that the defendants have no right to put any window and / or lattice projection or apertures in northern wall of the building constructed on plot No.92. A perpetual injunction was sought against the defendants restraining them from putting any windows, air-conditioner or any other contrivance in the said aperture on the northern wall of the construction on plot No.92. A mandatory injunction was also sought against the defendant directing them to close the apertures put in the northern wall of the structure constructed on the plot No.92.

2.The case of the plaintiff was that they are the owners of the land adjacent to plot No.92 on the northern side. In a construction made on plot No.92, an apertures / window is put up in the northern wall and air-conditioner is also installed, which is done in absence of any such right and a new right is sought to be created thereby.

2.1 The defendants resisted the suit by contending

that the suit was not maintainable in the form in which it is filed. The suit is false, frivolous and vexatious. That Ratilal M. Shah and Indiraben L Shah are necessary parties to the suit and in their absence, the suit is liable to be dismissed. It was contended that defendants are legally entitled to create apertures and the plaintiff is not entitled to take any objection for the same. It was also contended that the disputed aperture was there for a long time and the air-conditioner was installed within the knowledge of the plaintiff and the plaintiff had, with a view to cause damage to the machine, tried to remove the same with the help of ladder and ropes.

3.The trial Court, after considering rival side contentions raised the following issues.

“1. Whether the plaintiff proves that the northern wall of the building constructed suit plot No.92 was a blind wall without any windows, lattice, doors and any other apertures ?

2. Whether the plaintiff proves that defendant has illegally dug a hole of oblong nature in the said northern wall with an intention to get air and light from the said aperture ?

3. Whether the defendant proves that the disputed hole was already in existence in the northern wall of the said building ever since the same was constructed and that the defendant was entitled to make use of

the same by installing Air Condition Machine in the same as a matter of right as claimed by him ?

4. Whether the plaintiff is entitled to get declarations one injunction as prayed for in para 7 of the plaint ?

5. Whether the suit as framed is not maintainable as alleged by the defendant ?

6. Whether the suit is bad for non-joinder of necessary parties as alleged by the defendants ?

7. To what relief if any the plaintiff is entitled to ?

8. What order and decree ?”

4.The findings were as under.

“1. In the affirmative.

2. In the affirmative.

3. In the negative.

4. Party in the negative.

5. In the negative.

6. In the negative.

7. As per final order.

8. As per final order.”

5.The trial Court ultimately, came to a conclusion that the plaintiff was entitled to a mandatory injunction in its favour against the defendants directing the defendants to close the disputed aperture put in the northern wall of construction on plot No.92 and to put

the said northern wall in its original condition by removing the projection over the plaintiff's property. The Court directed the defendants to pay the cost of the litigation to the plaintiff, as well.

6. Aggrieved by the said judgment and decree, present appeal is preferred on the grounds raised in the memo of appeal.

7. Learned Senior Advocate, Mr.Jhaveri, appearing for the appellant submitted that the trial Court has committed an error in granting mandatory injunction without granting a declaration in favour of the plaintiff and against the defendant. Mr.Jhaveri, also, submitted that assuming for a moment that the defendant had no right to have an aperture in the northern wall, the same could have been closed by the plaintiff by raising a wall on its property, because undisputedly, the wall in which the aperture is put is not of the ownership of the plaintiff nor does the plaintiff claim any right over that property. Mr.Jhaveri, therefore, submitted that the appeal may be allowed and the decree may be set aside.

8. To-day, in all the calls, nobody appears for the

respondents. It would be appropriate to note that on earlier occasions on 14/9/2005, no Advocates for the parties appeared before this Court. When, nobody appeared for the parties despite on three calls, the matter was listed for final hearing on 14/11/2005 and then, also, nobody had appeared. By order dated 21/11/2005, the matter was ordered to be listed on 23/11/2005 by way of last opportunity. On that day, sick note was filed by learned Advocate, Mr.Jhaveri for the appellant and thereafter, the matter came to be adjourned from time to time, but on no occasions the respondents were represented. The matter is of 1981 and is listed for 71 occasions. The Court, is therefore, constrained to proceed with the matter ex-parte against the respondents.

9. Upon going through the impugned judgment, it is found that the trial Court observed that the declaration sought by the plaintiff cannot be granted for simple reason that owner of plot No.92 can create apertures and the plaintiff would be entitled to get the same removed within statutory period of prescriptive easement before the easementary right ripens and the declaration sought if granted, would affect the rights if accrued future. Therefore, declaration being

general in nature does not deserve to be granted and the plaintiff would be entitled to mandatory injunction asking the defendant to close the disputed aperture.

10. In the opinion of this Court, unless the easementary rights are decided by a Court of Law in favour of or against a party, mandatory injunction cannot be granted. The trial Court has not examined the question of existence or non-existence of such easementary right or action or violation of such right and has granted the mandatory injunction. It would be appropriate to refer to a decision reported in **A.I.R. 1945 Page 231 in the case of Devidas Vinayak Mahashur Vs. Brising S/o Bhiosan** where, it has been held that even nuisance is to be shown besides infringement of a right. In this regard, there appears not any specific evidence. Issue also does not seem to have been framed on aspect of nuisance. In the opinion of this Court, therefore, the Court below ran into an error in granting mandatory injunction in isolation. Such decree cannot be permitted to stand. Appeal, therefore, deserves to be allowed and the same is allowed. Decree passed by the learned Presiding Judge, Court No.17 of the City Civil Court, Ahmedabad on September 13, 1980 in Civil Suit No.1921 of 1975 is hereby set aside. The suit shall

stand dismissed. No order as to costs.

(A.L.DAVE, J.)

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